Federal Court  Cour fédérale

Date: 20110401

Docket: IMM-4600-10

Citation: 2011 FC 403

Ottawa, Ontario, April 1, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

SAMUEL ARTURO BARRIOS PINEDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant is a citizen of El Salvador where he practised medicine for many years. After treating a member of the notorious “La Mara 18” gang (MS-18) in 2005, he was threatened by other members of the gang allegedly for tipping off the police. He left El Salvador for the United States in

2005 and tried to obtain permanent resident status. After being arrested in 2006 for overstaying his visa, he came to Canada, in June 2007, and made a claim for protection.

[2] In a decision dated June 18, 2010, a panel of the Refugee Protection Division of the Immigration and Refugee Board (the Board) determined that the Applicant was neither a Convention refugee, pursuant to s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), nor a person in need of protection, pursuant to s. 97 of *IRPA*. It appears that the Board believed the Applicant's story except in one regard; specifically, the Board did not believe the Applicant's claim that he had gone to the police after threats were made against him. The Board went on to make three key findings:

- The s. 96 claim was denied on the basis that the Applicant's claim did not have a link or nexus to any of the five Convention grounds.

- The s. 97 claim was denied because the risk faced by the Applicant from MS-18 is a risk faced in every part of the country and faced generally by all individuals in El Salvador.

- The Applicant failed to rebut the presumption of state protection in El Salvador.

[3] The Applicant seeks to overturn the Board's decision. For the reasons that follow, I have determined that this application should be allowed.

II. Issues

[4] This application raises the following issues:

1. Did the Board err in assessing the credibility of the Applicant?

2. Did the Board err in concluding that the risk faced by the Applicant was generalized and that, therefore, he was not eligible for protection under s. 97 of *IRPA*?

3. Did the Board err in concluding that there was adequate state protection in El Salvador?

[5] The parties accept that the Board's decision is reviewable on a standard of reasonableness. On this standard, the Court should not intervene where the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para. 47).

III. Analysis

A. *Credibility finding*

[6] The only credibility finding made by the Board was that it did not believe that the Applicant reported his threats to the police. In its reasons, the Board states the following:

> He [the Applicant] also specifically stated that he did not call the police because "they would kill me more faster." In his original Personal Information Form (PIF) narrative he did not mention that he had gone to the police as a result of the telephone threats. In his amendment to the PIF, he stated that he went to the police after the second telephone call and they could not trace the call. He was asked why there was a difference between the statements in his application form, his original PIF narrative and his amended PIF. He could not offer an explanation but stated that his application form had been read back to him before he signed it but not after he signed it.

[7] The Applicant submits that this credibility finding is not supported by the evidence. I agree. While it is true that the Court cannot expect perfection in the written reasons of the Board, the reasons should accurately reflect what occurred at the hearing and should have a reasonable level of coherence. In this case, the above paragraph does not meet that standard. The cited paragraph misquotes the Applicant and incorrectly states that the Applicant was asked about the differences in the documentation. Contrary to the statement of the Board, the Applicant was never asked why he failed to mention his police contacts in his original PIF. However, this error does not impact on the determinative findings of the Board. This is because the Board, for purposes of its analysis of the availability of state protection, accepts the Applicant's story that he contacted the police on two occasions.

B. *Generalized Risk*

[8] Pursuant to s. 97 of *IRPA*, a person in need of protection is one whose removal would subject them personally to a risk to their life. However, s. 97 protection does not extend to cases where the risk is faced generally by other individuals from that country.

[9] The Board found that the risk faced by the Applicant from the MS-18 would be faced in every part of the country and is faced generally by all individuals in El Salvador. The Board stated that the fact that the Applicant may have been personally identified as a target because of suspicion that he gave information leading to the gang member's arrest does not necessarily remove him from the generalized risk category, since the nature of the risk is one that is faced generally by others in the country.

[10] The Applicant submits that the Board erred in concluding that the risk he faced is generalized. The Applicant asserts that because of his imputed actions, he is now personally targeted by the MS-18, since they believe he turned in one of their members.

[11] The Respondent submits that the Board thoroughly analyzed the Applicant's specific circumstances, but reasonably found that a risk due to the MS-18 is a risk faced generally by all the people in El Salvador (*Raza v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1385). The Respondent notes that even the Applicant stated in testimony that everyone in El Salvador was frightened of these members. The Respondent further submits that, as noted by the Board, the Court has upheld this finding for various victims of gangs (*Ventura de Parada v Canada (Minister of*

Citizenship and Immigration), 2009 FC 845; *Velasquez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 109). The Respondent asserts that, considering the fact that it is clear from the Board's reasons that it considered the specific circumstances of the Applicant and the fact that the Applicant did not advance any evidence to support his claim that he had a specific risk and not a generalized risk, it was open to the Board to find that the risk faced by the Applicant is one faced generally by other individuals in El Salvador.

[12] I acknowledge that, on a basic level, the Applicant is a victim of crime. However, the facts of this case are unusual in that the Applicant claims to have been personally and directly targeted by MS-18. The Board did not question the credibility of this aspect of his claim. In other words, this is not a generalized fear of being targeted by MS-18 just because the Applicant is a citizen or because of his profile as a doctor. The nature of the risk he now faces is not the same as the risk he faced prior to treating the gang member – before he treated the gang member, he was susceptible to extortion or violence, whereas now he is specifically and individually targeted for his perceived actions, unlike the general population.

[13] In virtually all of the cases cited by the Respondent, the applicants were not targeted personally *per se*. While the gangs may have known their names, their personal information, and may have even threatened them or assaulted them on a number of occasions, the nature of the threat was still generalized. The gang could have gone after anyone with perceived wealth, or any young person who may be recruited into their gang. These people were essentially means to an end for the gang members. I doubt that it really mattered whether person A or person B gave the gang the money for which they were searching, even if both parties were personally threatened. Similarly, I

doubt that it really mattered whether person C or person D joined their cause, provided that they continued to increase their membership. The situation before me is fundamentally different. The Applicant presented a story to the Board of being at risk because he was perceived to be a person who “ratted out” an individual gang member.

[14] I conclude that, on these facts, the Board erred in failing to carry out an adequate s. 97 analysis. This error would likely not have been material to the decision if the Board’s conclusion on state protection had been reasonable.

C. *State Protection*

[15] As an alternative to its findings that the Applicant’s s. 96 and s. 97 claims were rejected, the Board concluded that the Applicant had failed to rebut the presumption of state protection.

[16] The Applicant acknowledges that this finding would be determinative of his claim but asserts that this finding is not reasonable. Specifically, the Applicant submits that the Board failed to have regard to two key pieces of documentary evidence. In final submissions to the Board, the Applicant’s counsel spent considerable time highlighting the importance of these documents. Yet, a review of the reasons shows that there is no specific reference to or analysis of the documents.

[17] The first of the documents is a new set of guidelines published by the United Nations High Commissioner for Refugees entitled “Guidance Note on Refugee Claims Relating to Victims of Organized Gangs” (UNHCR Report). In the document, there are significant references to the actions

of the El Salvador gangs known as the “maras” (MS-18 being one of these gangs). For example, the document speaks of the following:

- the maras have considerable power and capacity to evade law enforcement;

- the maras may directly control society and *de facto* exercise power in the areas where they operate;

- the activities of gangs and certain state agents may be so closely intertwined that gangs exercise direct or indirect influence over a segment of the state or individual government officials; and

- the maras have country- or region-wide reach and organization, and there may generally be no realistic internal flight alternative.

[18] The Applicant also cites a recent publication from the International Human Rights Clinic at Harvard Law School, which was not referred to in the Board’s decision.

[19] The Respondent submits that it is clear from the Board’s reasons that it properly reviewed and analyzed the evidence as a whole and provided detailed reasons as to why it concluded as it did. The Respondent notes that the Board found that the Applicant could access state protection based on the evidence contained in the recent U.S. Department of State (DOS) report on country conditions in El Salvador in 2009, which indicated that civilian authorities maintained effective

control over security forces and there was no evidence that El Salvador was in a state of complete breakdown. The Respondent further notes that the Board explicitly acknowledged that El Salvador has significant difficulties in addressing criminality and corruption, but found that the state was making a concerted effort to deal with violence and that police are willing and able to protect its citizens. The Respondent submits that it was open to the Board to prefer the evidence upon which it relied to that submitted by the Applicant (*Aleshkina v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 589; *Tekin v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 357). The Respondent relies on the presumption that the Board considered all relevant evidence, and asserts that the Applicant has not rebutted this presumption (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (CA); *Hassan v Canada (Minister of Employment and Immigration)* (1992), 147 NR 317 (FCA); *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (TD); *Zsuzsanna v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 1642 (TD)).

[20] It is a well-established principle of law that the Board is not required to refer to every piece of evidence that contradicts its findings (*Hassan*, above). However, it is also true that the more important the evidence not specifically mentioned the more willing the court may be to infer that such evidence was ignored (*Bains v Canada (Minister of Employment and Immigration)* (1993), 63 FTR 312 (TD); *Cepeda-Gutierrez*, above). The two documents – particularly the UNHCR Report – are recent, they are from reliable sources, they are relevant to the claim of the Applicant and they contain material elements that contradict the conclusion of the Board about state protection. Neither of these documents was explicitly mentioned by the Board. Further, the reasons do not reflect the substance of the two pieces of evidence. In my view, given that counsel for the Applicant made

substantive and detailed submissions on the two documents in her final submissions to the Board, the failure of the Board to refer to the documents raises the inference that they were ignored. It would have been open to the Board to weigh the contents of the two documents and, with adequate reasons, prefer the U.S. DOS Report; what the Board cannot do is ignore the documents.

[21] I conclude that the Board's finding of state protection was unreasonable.

IV. Conclusion

[22] For these reasons, the application for judicial review will be allowed. Neither party proposed a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed, the decision of the Board is quashed and the matter is sent back to the Board for re-determination by a newly-constituted panel of the Board; and

2. No question of general importance is certified

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Sheliza Suchak	FOR THE APPLICANT
Monmi Goswami	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Greenberg Turner Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT